

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Section 72.202(b),
Table of Allotments,
FM Broadcast Stations.
(Red Lake, Minnesota)
MB Docket No. 16-371
RM-11777

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 2017

Released: February 22, 2017

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a Notice of Proposed Rule Making (Notice) issued in response to a Petition for Rule Making (Petition) filed by Red Lake Nation (Petitioner), proposing to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, by allotting FM Channel 287C1 at Red Lake, Minnesota, as a Tribal Allotment and a first local Tribal-owned service to the community. Petitioner filed comments. No other comments were received. For the reasons discussed below, we grant the Petition and allot Channel 287C1 at Red Lake, Minnesota, to the FM Table of Allotments as a Tribal Allotment.

2. Background. In Rural Radio, the Commission concluded that the public interest would be served by establishing a Section 307(b) priority in favor of Tribes and Tribal Entities proposing the allotment of FM channels to serve Tribal Lands. The Commission instituted several eligibility criteria to qualify for a Tribal Allotment. Petitioner, a federally-recognized Tribe, seeks waiver of the Tribal

1 Red Lake, Minnesota, Notice of Proposed Rule Making, 31 FCC Rcd 9698 (MB 2016).

2 Red Lake Nation is a registered trademark in the State of Minnesota of the Red Lake Band of Chippewa Indians.

3 47 CFR § 73.202(b).

4 Petitioner filed an associated FCC Form 301 application. FCC File No. BNPH-20151117AXW.

5 Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (NPRM); First Report and Order, 25 FCC Rcd 1583 (2010) (First R&O); Second Report and Order, 26 FCC Rcd 2556 (2011) (Second R&O); and Third Report and Order, 26 FCC Rcd 17642 (2011) (Third R&O) (collectively, Rural Radio).

6 Rural Radio, First R&O, 25 FCC Rcd at 1596-97; Rural Radio, NPRM, 24 FCC Rcd at 5248, n.29 (defining "Indian Tribe[s]" and "Federally-Recognized Indian Tribes"), and n.30 (defining "Tribal Lands").

7 In order to satisfy the prerequisites for a Tribal Allotment, the following eligibility criteria must be met: "(A) The applicant is either a federally recognized Tribe or Tribal consortium, or an entity 51 percent or more of which is owned or controlled by a Tribe or Tribes . . . ; (B)(1) At least 50 percent of the area within the proposed principal community contour is over that Tribe's Tribal Lands, or (2) the proposed principal community contour (a) encompasses 50 percent or more of that Tribe's Tribal Lands, (b) serves at least 2,000 people living on Tribal Lands, (continued....)

Lands coverage criteria of the Tribal Allotment Criteria,⁹ specifically subpart (B)(2)(c). Petitioner states that the total population on Tribal Lands residing within the proposed service contour constitutes less than 50 percent of the total covered population.¹⁰ In support of its waiver request, Petitioner explains that the proposed Class C1 allotment was selected in order to provide “meaningful service” to as many Red Lake Nation Tribal members as possible, while taking into account transmitter site constraints.¹¹ Petitioner states that there is limited selection for the proposed transmitter site due to several factors, including the infrastructure of Red Lake Nation Tribal Lands; the majority of the Tribal Lands are consumed by the Upper and Lower Red Lakes; and the international and domestic interference protection requirements.¹² Given the constraints on the transmitter placement, Petitioner explains that the proposed Class C1 allotment service area is needed in order to provide the requisite coverage to Red Lake Nation Tribal Lands and the community of Red Lake;¹³ to serve the significant number of Tribal members who live on “ceded” lands north of Red Lake Nation’s legal boundaries;¹⁴ and to provide some coverage to Bemidji and Thief River Falls, Minnesota, which are employment, training, and retail sources for Tribal members.¹⁵ Thief River Falls, for example, is the headquarters location of the Tribally owned Seven Clans Casino, which employs 300 Red Lake Nation citizens and is the location where Red Lake and Warroad Casino (both also Tribally owned) employees receive training.¹⁶ Finally, Petitioner explains that the proposed facility will serve as a vital communications source for Tribal members traveling through the region.¹⁷

3. Petitioner certifies that its proposal otherwise meets the requirements established in *Rural Radio* for a Tribal Priority.¹⁸ Petitioner states that (1) the proposed 70 dBu contour encompasses greater than 77 percent of Tribal Lands and serves 11,696 people living on Tribal Lands;¹⁹ (2) Red Lake, Minnesota, the proposed community of license, is located on Red Lake Nation Tribal Lands; (3) the proposed facility will be the first local transmission and Tribal-owned commercial radio service at Red Lake;²⁰ and (4) the proposed principal community contour would not cover more than 50 percent of the

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and (c) the total population on Tribal Lands residing within the proposed station’s service contour constitutes at least 50 percent of the total covered population . . . ; (C) The proposed community of license must be located on Tribal Lands; and (D) The proposed service must constitute first or second aural (reception) service, or first local Tribal-owned commercial transmission service at the proposed community of license.” (Tribal Allotment Criteria). *Third R&O*, 26 FCC Rcd at 17646-47, para. 8. See also *First R&O*, 25 FCC Rcd at 1596-97, paras. 26-27; *Second R&O*, 26 FCC Rcd at 2561-63, 2586-87, paras. 9-11, 59; 47 CFR § 73.3573, Note 5.

⁸ Petition at 1.

⁹ 47 CFR § 73.3573, Note 5.

¹⁰ Petitioner claims that the proposed allotment would provide a 60 dBu service to a population of 61,726, while the total population on Tribal Lands within the 60 dBu contour is 11,696. Supplement at 3.

¹¹ Supplement at 4.

¹² *Id.* at 3.

¹³ Petition at 4.

¹⁴ Supplement at 3.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Third R&O*, 26 FCC Rcd at 17646-47, para. 8. See also *First R&O*, 25 FCC Rcd at 1596-97, paras. 26-27; *Second R&O*, 26 FCC Rcd at 2585-87, paras. 9-11, 59; 47 CFR § 73.3573, Note 5.

¹⁹ *Id.* at 2-3.

²⁰ Supplement at n.2.

Tribal Lands of a non-applicant Tribe.²¹ Petitioner further states that Red Lake, Minnesota, is a community for allotment purposes. Red Lake is a census-designated place (CDP) in Beltrami County, with its own ZIP code,²² and a 2010 census population of 1,731 persons, of whom over 97 percent are Native American,²³ and Red Lake is home to the tribal government, high school, hospital, nursing home, and Red Lake Nation College.²⁴ Petitioner filed comments supporting the allotment proposed in the *Notice*.²⁵

4. **Discussion.** We find that the public interest will be served, and that there is good cause,²⁶ for waiver of subpart (B)(2)(c) of the Tribal Allotment Criteria. In the *Second R&O*, the Commission specifically stated that it will entertain waiver requests from applicants proposing Tribal service to areas where the population on Tribal Lands is less than 50 percent of the covered population.²⁷ The Commission explained that it would be receptive to waiver showings for proposed facilities designed to minimize non-Tribal coverage, while still providing needed service to Tribal Lands, or to remedy the absence of Tribal radio service in the area.²⁸ Here, Petitioner has demonstrated that due to transmitter site limitations, the proposed Class C1 maximum allotment is the only means to provide needed service to the legal boundaries of Red Lake Nation Tribal Lands (excluding Northwest Angle lands on the Canadian Border) and to as many Red Lake Nation Tribal members as possible. Petitioner also demonstrated that the proposed allotment will serve Tribal members who live on “ceded” land north of the Red Lake Reservation; those who are employed by or are training at Tribally owned businesses including casinos; and Tribal members traveling to and from major retail areas in the region.

5. The facts presented by Petitioner demonstrate that allotting Channel 287C1 at Red Lake, Minnesota, as a Tribal Allotment will serve the public interest by providing vital radio service to Red Lake and to surrounding Red Lake Nation Lands and by enabling the Petitioner to set its own communications priorities and goals with respect to this new service. The allotment will also further the public interest by providing a first local Tribal-owned transmission service at Red Lake, Minnesota. A staff engineering analysis confirms that Channel 287C1 can be allotted to Red Lake consistent with the minimum distance separation requirements of the Commission’s rules with a site restriction of 42.4 km

²¹ *Id.* at 3. The *Second R&O* requires that an applicant may not claim the Tribal Priority if the proposed principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe. *Second R&O*, 26 FCC Rcd at 2587, para. 59.

²² The ZIP code is 56671.

²³ United States Census Bureau, American Fact Finder, searchable at http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml# (last visited Sept. 15, 2016).

²⁴ Petition at 2.

²⁵ Petitioner Comment at 1-2 (filed December 19, 2016).

²⁶ Waiver is available on a showing of good cause, when the facts of a particular case make strict compliance with a rule inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972). In granting a waiver, the Commission must both explain why deviation better serves the public interest than strict application of the rule and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

²⁷ *Second R&O*, 26 FCC Rcd at 2587, para. 59.

²⁸ *Id.* at 2587, para. 59, n.156.

(25.34 miles) northwest of the community²⁹ at reference coordinates 47-59-00 NL and 95-33-33 WL.

6. **Conclusion.** Accordingly, IT IS ORDERED, That Red Lake Nation's waiver request of subpart (B)(2)(c) of the Tribal Allotment Criteria,³⁰ IS GRANTED.

7. IT IS FURTHER ORDERED, That effective April 8, 2017, the FM Table of Allotments, 47 CFR Section 73.202(b), IS AMENDED as follows:³¹

<u>Community</u>	<u>Channel Number</u>
Red Lake, Minnesota	287C1 ³²

8. The Commission will send a copy of this *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.³³ The Commission will release in the near future a public notice announcing a Threshold Qualifications Window. Any qualifying applicant may file an FCC Form 301 for this channel during the window.³⁴

9. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Adrienne Y. Denysyk, Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief
Audio Division
Media Bureau

²⁹ This site restriction is necessary in order to achieve 100 percent service coverage (60 dBu) to the legal boundaries of the Red Lake Nation Tribal Lands.

³⁰ 47 CFR § 73.3573, Note 5.

³¹ Concurrence by the Government of Canada is required because Channel 287C1 at Red Lake, Minnesota, is located within 320 kilometers (199 miles) of the U.S.-Canadian border. Canadian concurrence has been received for this vacant allotment.

³² This channel is reserved as a Tribal Allotment.

³³ 5 U.S.C. § 801 (a)(1)(A).

³⁴ *Third R&O*, 26 FCC Rcd at 17645-46; *Second R&O*, 26 FCC Rcd at 2588-90. Should no applicant meeting threshold qualifications file an FCC Form 301 during the Threshold Qualifications Window (and should the proponent request that its already-filed Form 301 application not be immediately processed), the Tribal Allotment will be included in the inventory for a broadcast auction at a later date. In that event, only threshold qualified applicants, including the original proponent, would be permitted to participate in the auction. *Third R&O*, 26 FCC Rcd at 17649.